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No. 87-1438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J. K. and SUSIE L. WADLEY RESEARCH INSTITUTE AND BLOOD BANK d/b/a THE BLOOD BANK AT WADLEY,

Petitioner,

v.

THE HONORABLE SAM HOUSTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The real parties in interest file this Brief In Opposition To Petition For Writ Of Certiorari, and would respectfully show:

STATEMENT OF THE CASE

On April 27, 1984, Doctor Ammons performed surgery on George W. Baker at Lewisville Memorial Hospital. Several units of blood were transfused into Mr. Baker during the surgery and post-surgery procedures. Wadley sold all the blood to Lewisville Memorial Hospital. On June 11, 1986, Mr. Baker died as

a result of having contracted the AIDS virus. At least one of the units of blood transfused into Mr. Baker was contaminated with the AIDS virus.

Plaintiffs, Patty Jo Baker, individually and as representative of the estate of George W. Baker, Ellis Lee Baker and Georgia Ellen Baker Slough ("the Bakers"), sued J.K. and Susie L. Wadley Research Institutes and Blood Bank d/b/a The Blood Center at Wadley ("Wadley"), and others, under the Texas wrongful death and survival statutes. The Bakers' First Amended Petition alleged a negligence cause of action, a strict liability cause of action and violation of the Texas Deceptive Trade Practices Act against Wadley for its role in procuring, testing, representing, supplying, selling, and/or failing to warn in regard to the blood transfused into Mr. Baker.

The Bakers served Wadley with Interrogatories, Requests for Production of Documents and Requests for Admissions. Wadley refused to produce many documents and refused to answer several interrogatories and requests for admission on the ground that such information was privileged under the physician-patient privilege and under an alleged donor constitutional right to privacy.

On March 27, 1987, Bakers' counsel and Wadley's counsel appeared at a hearing on Plaintiffs' Motion to Compel and on Defendants' Motion for Protective Order. After hearing the evidence, on April 24, 1987, Judge Sam Houston of the 211th District Court State of Texas rendered an Order which required Wadley to disclose:

> (1) The names, addresses, life or death status, test results and all documents reflecting

same of any donor of blood to the deceased, Baker, that is known by Wadley to have AIDS.

"AIDS" is defined to mean antibody positive, ARC, or having AIDS. This definition applies throughout this Order.

(2) The names, addresses, life or death status, test results and all documents reflecting same of any donor of blood to the decedent, Baker, whose AIDS status is unknown or is not available to Wadley;

(3) Any other information from any individual or entity that Wadley believes knows the AIDS status of any of the donors donating blood to the decedent Baker.

Respondent further ordered that Wadley did not need to give identifying information on any donors who tested negative for the AIDS virus. Wadley, however, was required to supply by number the test results and all documents pertaining to those donors who tested negative. The court further required that the above information and documents be submitted to the court for *in camera* review before disclosure to Plaintiffs' attorneys.

On April 30, 1987, Bakers' counsel and Wadley's counsel appeared at a second hearing on another Motion to Compel. The trial court ordered further similar discovery.

In arriving at both discovery orders, Respondent held that the donors were persons with knowledge of relevant facts pursuant to Rule 166b(3) of the Texas Rules of Civil Procedure. Respondent also held that

blood donors did not meet the definition of "patient" under the physician-patient privileges and immunities afforded by Texas Rule of Evidence 509. Additionally, Respondent held that the disclosure of the identity and address of the blood donors did not violate any constitutional right to privacy. Finally, Respondent held that institutional and society interests in maintaining a healthy and effective volunteer blood donation program did not warrant an order prohibiting discovery.

Respondent also invoked an extensive protective order, holding that the following restrictions shall apply:

> 1. The names and locations of the donors and test results on their blood shall be sealed with the Court and a number shall be assigned to each donor for reference during discovery unless otherwise ordered by the Court;
>
> 2. Documents containing identities of donors shall be filed with the court and sealed. Only parties counsel shall have access to these sealed documents;
>
> 3. The list of names of the donors shall be destroyed at the final disposition of the case, unless otherwise ordered by this Court;
>
> 4. Only the counsel of parties to this suit will have access to the names and locations of the blood donors and blood test results. The Plaintiffs are prohibited from disclosure of the donors' names or locations, either directly or indirectly, to third parties, without further order of this Court;

> 5. No party, their agents or representatives, shall directly or indirectly contact any blood "donor" identified through the records produced under this Order nor undertake further discovery regarding such "donors" until permitted to do so by further order of this Court.

Respondent, then, imposed strong protections on the use and availability of donor information.[1]

On May 18, 1987, Wadley filed in the Fort Worth Court of Appeals its Motion for Leave to File and Original Petition for Writ of Mandamus in an attempt to overturn Respondent's two discovery orders. After hearing oral argument, the Court of Appeals correctly held that Wadley's Petition for Writ of Mandamus was improvidently granted. Subsequently, on October 8, 1987, Wadley's Motion for Rehearing was denied.

Wadley then filed Petition for Writ of Mandamus with the Texas Supreme Court. On January 6, 1988, the Texas Supreme Court overruled Wadley's motion for rehearing of motion for leave to file mandamus. Quite simply, Wadley failed to show that Respondent abused his discretion in ordering limited discovery.

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[1] In footnote 2 of Wadley's petition, Wadley implies that the Court's internal handling and control of documents will not adequately safeguard confidential information. Footnote 2 states: "As already noted, a portion of the *in camera* documents, dealing with health-status information, was inadvertently left in the general file in the District Court and was later seen by one of the plaintiff's attorneys." Plaintiffs would point out that the document in question was left in the file due to the fault of Wadley's attorneys and not in any way due to any fault or act of the trial court.

ARGUMENT AND AUTHORITIES

I. THIS COURT HAS ALREADY ANSWERED THE ISSUE PRESENTED BY THIS PETITION

On February 22, 1988, this Court denied the Petition for Writ of Certiorari in *Tarrant County Hosp. Dist. v. Hon. William L. Hughes, Jr., et al.*, Cause No. 87-1082. *Hughes* presented and answered the exact issue here: whether blood donors who donated blood to a deceased have a constitutional right of privacy as to limited disclosure of their identities in a wrongful death suit against a blood bank. In essence, this Court properly held that such information did not rise to the level of being constitutionally protected. Following *Hughes*, this Court should overrule Wadley's Petition for Writ of Certiorari.

II. BLOOD DONORS "ALLEGED" FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY

This Court has recognized a right of privacy as a constitutional right arising out of a variety of provisions in the Bill of Rights and the Fourteenth Amendment. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891); *Katz v. United States*, 389 U.S. 347 (1967); *Roe v. Wade*, 410 U.S. 113 (1973); *Whalen v. Roe*, 429 U.S. 589 (1977). This Court has only allowed persons to invoke this right in very limited instances. In a wrongful death suit against a blood bank, blood donors fail to meet the criteria established by this Court for application of the limited constitutional right to privacy.

The Texas courts also recognize a right to privacy. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). The Texas decisions, however, do not delineate what exactly this right encompasses. *Ex Parte Abell*, 613

S.W.2d 255, 265 (Tex. 1981) (Spears, J., dissenting.) It is well recognized that "in any society a total right of privacy is infeasible, particularly where disclosure is concerned." *Id.* In fact, the decisions indicate that "only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in the guaranty of personal privacy." *Id.*; *Whalen*, 429 U.S. at 599; *Paul v. Davis*, 424 U.S. 693, 713 (1976).

The right to privacy has consistently been applied to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul*, 424 U.S. at 713. These areas are deemed so *fundamental* that they require constitutional protection from state interference. When a *fundamental* privacy right is involved, the state must show a "compelling interest" before invading the designated zone of privacy. *Roe v. Wade*, 410 U.S. at 178. The donors' right to privacy does not fall within the fundamental sphere of privacy rights.

Of course, state constitutions can afford citizens broader rights than the federal constitution. Significantly, here, in denying leave to file mandamus, the Texas Supreme Court in essence refused to hold that blood donors had a constitutional right to privacy under the Texas State Constitution.

The right to privacy is not absolute but instead, "the individual's right of privacy must be weighed against the impact and the threat involved in a state requiring disclosure." *Ex Parte Abell*, 613 S.W.2d at 266 (Spears, J., dissenting.) The state's interest in discovery of potential parties and witnesses is totally justified and warranted. If a donor privacy interest in fact exists, a minor intrusion is wholly justified

and warranted on six very strong grounds: (1) society's interest in disease-free blood; (2) the Bakers' and society's right to the truth and the ability to prove up a cause of action; (3) the fact that donor identities have been revealed in lawsuits in other jurisdictions with no effect on the blood supply; (4) the Texas blood statute which informs Texans that blood donation is not a private affair; (5) Texas Senate Bill 1405; and (6) the fact that blood donors do not have a reasonable expectation of privacy.

1. Texas Has An Interest In A Disease-Free Blood Supply

Texas has a substantial state interest in protecting its citizens from diseased blood. Plaintiffs' request for the identity of the donors does not present a "unwarranted invasion" of the donor's privacy when viewed in light of the public's need for a disease free blood supply. Let's face it—AIDS kills. Making blood banks accountable for all their actions in dealing with blood that goes to the public, helps ensure that blood banks take the *utmost* care in the procuring, processing, and selling of blood. One method to promote this interest is by holding negligent blood banks responsible for their acts. The only way negligent blood banks will ever be held accountable for their acts is for the identity of donor witnesses to be revealed so that the plaintiffs may pursue their rights against the irresponsible party.

Civil litigation and punitive damages are available as security checks to help make sure blood banks (and other big businesses) maintain adequate standards. In our society, accountability is critical to protection of our entire community.

2. The Bakers And Society Have A Right To The Truth

a. The Bakers' Interest in the Identities of the Donors as Witnesses

The blood donors whose blood was transfused into George W. Baker (the "Baker donors") are witnesses to the most important events surrounding Mr. Baker's death. The Baker donors can provide the most relevant information in regard to the screening procedures *actually applied* by Wadley for the blood that was transfused into Mr. Baker. The Baker donors know if:

1. The Wadley screener actually provided information on high risk groups;

2. The high risk information was adequate to apprise the donor that he or she might be in a high risk group;

3. The Wadley screener actually asked about drug use;

4. The Wadley screener actually asked all the questions on the donor information card;

5. The Wadley screener checked the donor's body for drug use;

6. Wadley paid the donor which would subject Wadley to *strict liability* (one of the plaintiffs' allegations) under Chapter 77 of the Texas Civil Practice and Remedies Code;

7. They were given an opportunity to tell Wadley not to use their blood;

8. Their physical condition should have indicated that their blood should not be used;

> 9. They are dead—particularly if they died of AIDS. Sometimes a witness from the grave can speak louder on negligence than a live witness.

All this "*unavailable*" information might establish that Wadley was running a shoddy operation or was perhaps negligent in this one instance.

The significance of receiving the identity of the donors is exemplified in *Cutter Laboratories v. Austin Blood Components*, which has been filed in the United States District Court for the Western District of Texas, Austin Division. (Exhibit A-1.) In *Cutter Laboratories*, the complaint alleges that the donor, a Christopher Whitfield, donated blood "on nearly forty-eight (48) occasions between November 18, 1982 and September 16, 1983." The last donation was *five* weeks before Whitfield's death from the AIDS virus. Certainly, the fact of a blood donation five weeks prior to death is some evidence that screeners may not have paid attention to the physical condition of the donor, thereby violating standards of the blood banking industry. Without the donor's identity, the *Cutter* plaintiff may not have received this critical information in regard to possible negligence.

b. The Bakers Have a Right to the Identity of the Donors as Witnesses and Potential Parties

Texas has very liberal discovery rules. In delineating the scope of discovery, Texas Rule of Civil Procedure 166b(2)(a) states that "[p]arties may obtain discovery regarding *any matter* which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the parties seeking discovery or the claim or defense of any other party." More importantly, Rule 166b(2)(d) provides that:

> [a] party may obtain discovery of the identity and location (name, address and telephone number) of *any potential party* and of *persons having knowledge of relevant facts.* A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

Tex. R. Civ. P. 166(2)(d). Thus, in promulgating the Rules of Civil Procedure, the Texas Supreme Court mandated that the names of persons who may have knowledge of relevant facts or who may be potential parties are discoverable.

(1) Wadley Admitted That The Donors Have Knowledge Of Relevant Facts

On November 19, 1986, Wadley responded to Plaintiffs' Request for Admission and admitted that all thirteen Wadley donors were "persons with knowledge of relevant facts concerning the donor screening procedures utilized by Wadley, either now or in the past." (Exhibit A-2). Wadley admitted the obvious—these donors inescapably know whether Wadley was negligent in screening them.

(2) Blood Statute Mandates That Donors Are Potential Parties

The Baker donors are not only persons with knowledge of relevant facts but are also potential parties. Under Texas Civil Practice and Remedies Code §77.003, "[a] person who donates a human body part [blood] . . . *remains liable for the person's own neg-*

ligence." (For full text of Chapter 77, see Exhibit A-3.) Under the plain meaning of the statute, the legislature created a cause of action against donors for negligence in providing blood. Wadley's contention to the contrary thwarts the intent of the legislature as expressed in the statute. The Bakers are entitled to get the identity, address and telephone number of these potential parties as defined by the Texas Legislature.

(3) Rule 166(b)(3)(e) Mandates Discovery

Rule 166(b)(3) of the Texas Rules of Civil Procedure dictates that:

> Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person with knowledge of relevant facts . . .

Thus, the Rules of Civil Procedure provide that Plaintiffs are entitled to the names of the donors because they are persons with knowledge of relevant facts and potential parties.

(4) The Texas Supreme Court Has Mandated Discovery

The Texas Supreme Court has unequivocally declared that the Bakers are entitled to the identity and locations of the donors. In *Giffin v. Smith,* 688 S.W.2d 112 (Tex. 1985), the Court stated that "[t]he plain language of Rule 166b thus makes it clear that information concerning the *identity and location of persons having knowledge of relevant facts can never be protected from discovery.*" *Id.* at 113 (emphasis added). The Bakers would place emphasis on the Court's language: "never be protected from discovery." The identity and location of potential parties and persons

having knowledge of relevant facts is necessary for the administration of justice. Thus, this Court should deny Wadley's Petition for Writ of Mandamus.

c. Society's Interest

Texas has a substantial interest in seeing that the discovery process permits every person to discover evidence necessary to the presentation of his or her case. *Ex Parte Abell*, 613 S.W.2d at 267 (Spears, J., dissenting.) Without such a right to discovery, Texas would be unable to provide its citizens a forum for effective dispute resolution. The Bakers and other innocent citizens need to know the facts surrounding an AIDS' death.

Because of Respondent's protections, the invasion into a donor's privacy interest, if one exists, is slight. These donors, however, are key witnesses. The duty to testify has been regarded as so necessary to the administration of justice that the witness's personal interest and privacy must yield to the public's overriding interest in full disclosure. *United States v. Calandra*, 414 U.S. 338 (1974) (citing *Blair v. United States*, 250 U.S. 273, 281 (1919)). The donors are the only people who can relate what actually happened.

If the Bakers do not receive the requested information, they cannot know the events surrounding George W. Baker's death. "No man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced." *Ex Parte Abell*, 613 S.W.2d at 268 (Spears,J., dissenting) (quoting 58 Am. Jur., Witness §29; 8 Wigmore, Evidence §2212.) The Bakers believe that Wadley fights hard for implementation of a privilege not to protect donors from

embarrassment, rather Wadley seeks to protect itself by shielding society and plaintiffs from the truth.

3. Donor Identities Have Been Revealed In Lawsuits In Other Jurisdictions With No Effect On The Blood Supply

Wadley worries about the blood supply "drying up" if donors identities are revealed to a Court. Blood banks, however, do not ever cite any *concrete evidence* that the release of a donor's identity will dry up the blood supply. Where are the studies? Where are the blood banks' statistics? Blood banks cite no evidence because *no evidence exists.*

The only evidence in the record disproves the blood bank's argument. The predecessor statute to Tex. Civ. Prac. & Rem. Code §77.003 (the Texas Blood Statute) was enacted in 1971. That statute makes a blood donor liable for his or her negligence in donating blood. Despite enactment of this statute, blood donations at Wadley have consistently increased. (Exhibit A-4). Presumed to know the law, donors in increasing numbers have continued to donate despite the fact that a Texas statute makes them liable for negligently donating blood. Wadley's "dry up" argument is "all wet." Without accountability, the blood supply will certainly be rendered worthless.

At an evidentiary hearing, Bill Teague (President of Gulf Coast Regional Blood Center, the other defendant in this action) was asked what percentage of the Houston area healthy potential donor pool actually donates blood. Teague replied "six to seven percent." Mr. Teague was then asked the following hypothetical question:

> Q. . . . When the first person with [a] common blood type in a major metropolitan area dies because there's no blood, don't you believe that there's a potential that the ninety-three or ninety-four percent of your untapped [donor] pool might step forward and donate blood? . . .
>
> THE WITNESS: I would hate to see anybody die for any reason. I've committed my entire life to keeping people alive, and I can't imagine someone letting someone die just to prove a point. *But I don't know how the donor population would react.*
>
> Q. (By Mr. Woods) Thank you. I think that's what I have been arguing all along . . .

(Exhibit A-5). Bill Teague finally hit the nail on the head—no one knows how the donor population will react. Thus, the blood bank's "sky is falling" logic has no basis and there is no proof that the blood supply will dry up.

Significantly, the identities of persons who donated blood have previously been printed in the West Reporter System for "all the world to see." In *Hutchins v. Blood Services of Montana*, 506 P.2d 449 (Mont. 1973), plaintiff received not only the identity of the donor but also testimony from the donor. The Supreme Court of Montana additionally published the following personal information:

> . . . [D]onor *Sharon Holm*, a *19-year-old resident of Butte*, felt and appeared in good

> health. She had never previously donated blood . . .

Id. at 451. Certainly, the *Hutchins* court did not maintain that the donor had a constitutional right to privacy.

Similarly, in *Hoder v. Sayet*, 196 So.2d 205 (Fla. Dist. Ct. App. 1967), plaintiff received the identity of the blood donor and was allowed to depose the donor. The *Hoder* court then relates:

> Albanese [the donor] testified by deposition that he was asked none of the [donor screening] questions prior to the taking of his blood by the blood bank.

Id. at 209. Again, the court failed to hold that Albanese had a constitutional right of confidentiality. Interestingly, the case above also shows that critical information can be obtained only by personally talking to the donors. *See also Tufaro v. Methodist Hosp., Inc.*, 368 So.2d 1219 (La. Ct. App. 1979). (Donor "was a drifter with a criminal conviction who moved from job to job"). It should be noted that the blood banks cannot show that the blood supplies in Montana or Florida have "dried up" since the *Hutchins* and *Hoder* cases.

Significantly, a blood bank screener who draws hundreds or thousands of units of blood cannot possibly remember what happened in one instance. The donor, however, may remember quite vividly whether he or she was provided with an AIDS information sheet, was asked about night sweats, or had their arm examined for needle marks. The donor is the only source for this critical information.

4. The Texas Blood Statute Informs Texans That Blood Donation Is Not A Private Affair

Section 77.003 of the Texas Civil Practice and Remedies Code dictates that "[a] person who donates a human body part [blood] . . . remains liable for the person's own negligence." The statute imposes an affirmative duty on the donor to exercise reasonable care in the donation of blood. By holding donors liable, Section 77.003 mandates that the donation of blood is not a private affair.

The very language of the blood statute gives a donor adequate notice that donating blood is a responsibility which carries with it a duty to exercise a standard of reasonable care and liability for failing to do so. In *E.F. Stafford Mfg. Co. v. Wichita School Supply Co.*, 23 S.W.2d 695 (Tex. Comm'n App. 1930, opinion adopted), the court observed that: "the rule is too elementary to require the citation of authority that all persons are conclusively presumed to know the law." *Id.* at 697. Actual knowledge of the law is immaterial. *Armstrong Tire & Rubber Co. v. Shearer*, 290 S.W.2d 294, 296 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.); *Daniel Lumber Co. v. Settlemire*, 256 S.W.2d 922 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.). Donors, then, are presumed to know about §77.003 and the legal implications if they negligently donate blood.

Application of a right of privacy to disclosure of donor identity would render §77.003 meaningless. The Texas legislature enacted Chapter 77 to hold negligant donors liable. No liability, however, can attach when there is no disclosure. The legislature would not do a needless act—it would not give the Bakers and others a cause of action against blood donors and then

fail to give plaintiffs any way to enforce their cause of action. It is well-settled that the intention of the Legislature in enacting a statute is the statute itself, and aim and object of construction is to ascertain and enforce the legislative intent, and not to defeat, nullify, or thwart it. *City of Mason v. West Texas Utilities Co.*, 150 Tex. 18, 237 S.W.2d 273 (1951). By enacting §77.003, the Legislature has determined that donor identities are discoverable.

5. Senate Bill 1405 Again Dictates No Right to Privacy Exists For Donors

Recently, the Texas Legislature passed Senate Bill 1405 which deals with disclosure of blood donors identities and test results. The Act specifically calls for the release of donor information to a Court of competent jurisdiction. Section 7 of the Act provides that it "shall be applied prospectively only. Nothing in this Act affects either procedurally or substantively a case that was filed in the Courts of this state before the effective date of this Act." *Thus, the Act does not apply here.*

The bill analysis to House Bill 2444 and Senate Bill 1405, however, dictates that:

> Current law does not provide for the confidentiality of donor records. They are not subject to confidentiality as medical records because the physician-patient relationship does not exist.

(Exhibit A-6.) Again, current law *does not* provide for confidentiality of donor records. Thus, members of the Texas legislature clearly do not believe that a right to privacy exists for a donor.

6. Donors Have No Expectation Of Privacy

Wadley blood donors are never told that information taker during donation will be kept confidential. The donor cards do not contain language which indicates the information provided will not be disseminated.

As Dr. Hill (Wadley's CEO) admitted:

Q. When a donor comes in to give blood to Wadley, do you know of any documents that show that they are told their identities and test results on their blood will be kept confidential?

A. I don't know of any specific language to that effect.

Q. Well, we know that an alleged promise of confidentiality is not on the donor source cards, do we not?

A. No, but it is certainly the standard of what we have done throughout history of blood banking.

Q. I am talking about what you tell the donors when they come in.

A. No.

Q. You never tell them that their identities and test results on their blood will be kept confidential, do you?

A. No, we don't explicitly tell them that.

(Exhibit A-7.) Since the donor has no "reasonable expectation of privacy," there is no plausible way that the blood donor's right to privacy could be violated.

By coming forward to donate blood, donors have waived their right to privacy. Blood donors have knowingly placed themselves in the public light and their actions must then be measured by that of a reasonable person. The Bakers have a right to know how George W. Baker was killed.

III. WADLEY'S CASE AUTHORITY IS INAPPLICABLE

Wadley argues that there is a conflict between the highest courts of two states on a constitutional issue—such is not the case. *No court in any jurisdiction has yet found that blood donors have a constitutional right to privacy.*

Wadley urges that the case of *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987)[2] establishes a constitutional right to privacy. The Bakers disagree. Significantly, the *Rasmussen* court expressly refused to adopt a federal constitutional right to privacy. The *Rasmussen* court merely determined that the donors in that case had a right of confidentiality

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[2] In *Rasmussen v. South Florida Blood Service*, 500 So.2d (Fla. 1987), Rasmussen, while hospitalized for injuries in a car accident, allegedly contracted AIDS from necessary blood transfusions. Rasmussen sued only the owners and operators of the vehicle involved in the collision, but attempted to discover the identity of blood donors revealed in hospital records by subpoenaing the records of South Florida Blood Services, Inc. ("SFBC"). *SFBC was not a party to the suit* and moved to quash the subpoena or for a protective order on the grounds that Rasmussen failed to show good cause or justifiable reason for an invasion of private, confidential records of the blood bank and its donors.

under the Florida discovery rules. Wadley asks this Court to create for the first time a "blanket" federal constitutional right to privacy for blood donors. This Court should refuse that request.

The *Rasmussen* case is obviously distinguishable from this case because:

(a) The blood donors in *Rasmussen* were not eyewitnesses to the claimed acts of negligence since Rasmussen plaintiff did not sue the hospital or the blood bank providing the blood. As the court states, "South Florida Blood Service is *not* a *party* to the underlying personal injury litigation and there has been *no allegation of negligence* on the part of the Blood Service." In essence, *Rasmussen* is merely an auto collision case. In the case at hand, *the hospital and the blood bank are "the" party defendants accused of negligence* and the donors are eyewitnesses to the blood bank's negligent donor screening procedure.

(b) The Florida discovery rules are very different from the Texas discovery rules. Unlike the Florida rules, the Texas rules limit discovery in only a few very specific situations. Further, Texas rule 166b specifically provides: "*Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge of relevant facts . . .*"

(c) Unlike Florida, Texas does not have a state constitutional provision granting a state constitutional right to privacy.

(d) Unlike Texas, Florida does not have a statute which makes a blood donor liable for his own negligence. Therefore, the *Rasmussen* court did not have to consider the statutory duty imposed on blood do-

nors in balancing the privacy interests of donors. The Texas statute puts blood donors on notice that they can be held liable for their negligence.

Wadley also relies on two *district court* cases for support of its feeble position on a constitutional right to privacy. One case is from New York; the other is from Pennsylvania. What is truly interesting is Wadley's argument that these two district court cases are in some way persuasive when in fact neither of the cases support Wadley's claimed privilege of a constitutional right to privacy. *Significantly, both judges refused to find a constitutional right to privacy.* The New York judge applied his state's statutory patient-physician privilege; the Pennsylvania judge applied his state's discovery rule 4011(b)—importantly, not the discovery rule dealing with privileges.

In its brief, Wadley also argues that *Head v. Colloton*, 331 N.W.2d 870 (Iowa 1983) stands in line with its position here. Yet, *Head* is entirely distinguishable. In *Head*, plaintiff, a leukemia victim, sought under *Iowa's public record statute* the identity of a woman whose bone marrow matched the type of plaintiff. *Head* involves a hospital and the Iowa Public Records Act. Iowa has a separate specific statute granting a privilege to hospitals. *Head* does not arise in an adversarial context seeking eyewitnesses to a wrongful death; does not involve Texas Rule of Civil Procedure 166(b); does not involve potential parties and witnesses; and does not involve the Texas Blood Statute. It is inconceivable how Wadley can consider *Head* to be significantly consistent with its position here.

Wadley's authority is inapplicable: no court has done what Wadley seeks to have done here. This Court should deny Wadley's Petition for Writ of Certiorari.

CONCLUSION

The Texas Courts have correctly concluded that limited discovery is appropriate in lawsuits against blood banks. Based on the limited nature of the intrusion, there is no violation of a blood donor's "alleged" constitutional right to privacy. Wadley's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SHANK, IRWIN, CONANT, LIPSHY & CASTERLINE

By: /s/A. W. ARNOLD, III
A. W. Arnold, III
Counsel of Record
GREGORY N. WOODS

2200 Lincoln Plaza
500 North Akard
Dallas, Texas 75201-4713
(214) 720-9700

Attorneys for Real Parties
In Interest

APPENDIX

EXHIBIT A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CUTTER LABORATORIES, INC.,	)	
MILES LABORATORIES, and	)	
RHINECHEM CORPORATION	)	C.A. NO.
	)	A 85 CA 600
VS.	)	
	)	
AUSTIN BLOOD COMPONENTS, INC.	)	
and EDWARD R. GEAGAN, M.D.	)	

FILED
OCT 21, 3:56 PM '85

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW CUTTER LABORATORIES, INC., MILES LABORATORIES, and RHINECHEM CORPORATION, hereinafter sometimes collectively referred to as "Plaintiffs", complaining of AUSTIN BLOOD COMPONENTS, INC. and EDWARD M. GEAGAN, M.D., hereinafter sometimes singly or collectively referred to as "Defendants", and for causes of action would respectfully show as follows:

PARTIES AND SERVICE OF PROCESS

1. Plaintiff CUTTER LABORATORIES, INC. was a corporation incorporated under and existing by virtue of the laws of the State of Delaware, with its principal place of business in the State of California. On December 31, 1982, Plaintiff CUTTER LABORATORIES, INC. was merged into MILES LABORATORIES and is now a di-

vision of that entity. Plaintiff MILES LABORATORIES is a corporation incorporated under and existing by virtue of the laws of the State of Delaware, with its principal place of business in the State of Indiana. Plaintiff RHINECHEM CORPORATION is a corporation incorporated under and existing by virtue of the laws of the State of Delaware, with its principal place of business in the State of Pennsylvania. RHINECHEM CORPORATION is the parent corporation of MILES LABORATORIES and owns one hundred per cent of the stock of that corporation.

2. Defendant AUSTIN BLOOD COMPONENTS, INC. is a corporation incorporated under and existing by virtue of the laws of the State of Texas and is lawfully doing business in the State of Texas. Defendant AUSTIN BLOOD COMPONENTS, INC. has its principal place of business in Travis County, Texas and may be served with process by serving its registered agent for service, Joseph M. Hill, Jr., 534 Southland Center, Dallas, Texas.

3. Defendant EDWARD R. GEAGAN is an individual domiciled with in the State of Texas, licensed as a medical physician in the State of Texas, and may be served at this residence at 10910 Preston Trails Drive, Austin, Texas 78747.

JURISDICTION

4. This is a civil action for damages. It is brought pursuant to the common law and the statutes of the State of Texas, and the statutes of the United States. The amount in controversy exceeds TEN THOUSAND AND 00/100 DOLLARS ($10,000), exclusive of interest and costs. There is complete diversity of citizenship between the parties, and accordingly, This Court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1332. Additionally, this cause of action involves the construction and application of statutes and laws of the United States. Accord-

ingly, this court has jurisdiction of this cause pursuant to 28 U.S.C. § 1331.

FACTUAL BACKGROUND

5. At certain times during the years 1982 and 1983, Defendant AUSTIN BLOOD COMPONENTS, INC. obtained source plasma from various paid blood donors at its blood donor center on West Sixth Street in Austin, Texas. Source plasma is the fluid portion of human blood collected by plasmapheresis, a procedure in which blood is removed from a donor, the plasma separated from the formed elements, and at least the red blood cells returned to the donor.

6. The source plasma obtained through plasmapheresis is used by purchasers such as the Plaintiffs for the production of numerous medical products, including koate and konyne. These are drugs administered to hemophiliacs to augment the clotting of blood.

7. Over a two-year period, the Defendant AUSTIN BLOOD COMPONENTS, INC. received, for cash, blood donated by one Christopher Whitfield. Whitfield donated blood on nearly forty-eight (48) separate occasions between November 18, 1982 and September 16, 1983.

8. Christopher Whitfield was a homosexual who, over most if not all of the time period during which he sold his blood to the Defendant AUSTIN BLOOD COMPONENTS, INC., was suffering from "Acquired Immune Deficiency Syndrome", commonly kpown and hereinafter referred to as AIDS.

9. AIDS is a highly contagious disease which is spread intravenously and/or through the passing of bodily fluids during sexual intercourse. It typically afflicts male homosexuals, hemophiliacs, and natives of the country of Haiti. However, as noted above, it may be contracted intravenously if the intravenous instrument or compound is infected with the AIDS virus.

10. Although the Defendant AUSTIN BLOOD COMPONENTS, INC. knew or should have known that Christopher Whitfield presented a substantial risk of carrying AIDS, it nonetheless continued to purchase his blood for cash and to process that blood into various by-products, which it in turn sold to the Plaintiffs for a substantial profit.

11. On October 21, 1983, Christopher Whitfield died. Although no autopsy was performed, it was established by several medical authorities that Christopher Whitfield died from complications resulting from his affliction with AIDS.

12. After learning from various sources that Christopher Whitfield has sold his blood to the Defendant AUSTIN BLOOD COMPONENTS, INC., and that Whitfield was suspected of having died from AIDS, the Plaintiffs employed independent physicians to determine whether it was likely that any source plasma they had purchased form AUSTIN BLOOD COMPONENTS, INC. was in fact contaminated by an AIDS virus.

13. The physicians employed by the Plaintiffs confirmed that Christopher Whitfield had been suffering from AIDS at the time of his death. Having been put on notice of the fact that they had purchased contaminated blood products from the Defendant AUSTIN BLOOD COMPONENTS, INC., the Plaintiffs proceeded immediately to trace all of the source plasma extracted from Christopher Whitfield's blood which it had purchased from the Defendant AUSTIN BLOOD COMPONENTS, INC.

14. Thereafter, the Plaintiffs recalled all shipments of koate and konyne manufactured from Christopher Whitfield's source plasma of which they had knowledge. The Plaintiffs also attempted to locate any such drugs then in the process of manufacture which contained as a component source plasma derived from Christopher Whitfield's blood so as to insure they would never be placed in the market.

15. After recalling the contaminated shipments, and segregating the incompletely manufactured contaminated drugs, the Plaintiffs attended to the destruction of those drugs.

16. As a direct, proximate and producing result of purchasing the contaminated source plasma from the Defendant AUSTIN BLOOD COMPONENTS, INC., the Plaintiffs sustained enormous and substantial losses. As nearly as may be calculated presently, the Plaintiffs' damages represented by the purchase price of the contaminated source plasma, the value of the recalled drugs and incompletely manufactured drugs, and miscellaneous costs associated with protecting the public from the contaminated products exceed FOUR MILLION AND NO/100 DOLLARS ($4,000,000.00).

CAUSES OF ACTION AGAINST AUSTIN BLOOD COMPONENTS, INC.

* * * *

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the above-named Defendants be served with process and be required to appear and answer herein; that upon final trail or hearing thereof, Plaintiffs recover their damages from said Defendants; that Plaintiffs be allowed interest on their damages at the maximum rate allowed by law; that Plaintiffs recover damages under the Texas Deceptive Trade Practices Consumer Protection Act; that Plaintiffs recover their attorneys' fees for prosecution of this action; that the Plaintiffs recover punitive damages against the Defendants; that Plaintiffs be allowed to recover their costs of court; and for such other and further relief as may be appropriate.

Respectfully submitted,

BY: J.D. SUTTER
J. DOUGLAS SUTTER
CHARLES W. KELLY
GUY M. HOHMANN
2800 Four Allen Center
Houston, Texas 77002
(713) 651-0600

ATTORNEYS IN CHARGE FOR PLAINTIFFS

OF COUNSEL:
ROSS, GRIGGS & HARRISON

EXHIBIT A-2

CAUSE NO. 86-2728-C

PATTY JO BAKER, Individually and as Representative of the Estate of GEORGE W. BAKER	)	IN THE DISTRICT COURT
vs.	)	
DENTON COUNTY, TEXAS DAVID H. AMMONS, M.D., P.A., INC., and J.K. and SUSIE L. WADLEY RESEARCH INSTITUTE AND BLOOD BANK D/B/A the BLOOD CENTER AT WADLEY	)	DENTON COUNTY, TEXAS 211TH JUDICIAL DISTRICT

DEFENDANT J.K. AND SUSIE L. WADLEY RESEARCH INSTITUTE AND BLOOD BANK D/B/A THE BLOOD CENTER AT WADLEY'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSION

TO: Plainitiff Patty Jo Baker by and through her attorney of record, Mr. A.W. Arnold III, 4100 Thanksgiving Tower, Dallas, Texas 75201.

COMES NOW Defendant J.K. AND SUSIE L. WADLEY RESEARCH INSTITUTE AND BLOOD BANK D/B/A THE BLOOD CENTER AT WADLEY, and files this, its Response to Plaintiff's Request for Admission, pursuant to The Texas Rules of Civil Procedure.

Respectfully submitted,

COWLES & THOMPSON

By: JOHN F. O'CONNELL
/s/JOHN F. O'DONNELL
State Bar No. 15210700
4000 InterFirst Plaza
901 Main Street
Dallas, Texas 75202
(214) 670-1106

ATTORNEY FOR DEFENDANT J.K. AND SUSIE L. WADLEY RESEARCH INSTITUTE AND BLOOD BANK D/B/A THE BLOOD CENTER AT WADLEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was mailed this the 19 day of November, 1986 to attorney for Plaintiff, Mr. A.W. Arnold, III, 4100 Thanksgiving Tower, Dallas, Texas 75201, by certified mail, return receipt requested; and to Mr. Bruce E. Anderson, P.O. Box 1588, Austin, Texas 78767, by regular mail.

/s/JOHN F. O'DONNELL

NO. 86-2728-C

TY JO BAKER, Individually as Representative of the ate of GEORGE W. BAKER, *Plaintiff,*	)	IN THE DISTRICT COURT
s.	)	DENTON COUNTY, TEXAS
VID H. AMMONS, M.D., P.A., VISVILLE MEMORIAL HOSPITAL, and J.K. and SUSIE L. DLEY RESEARCH INSTITUTES BLOOD BANK d/b/a/ the OD CENTER AT WADLEY, *Defendants.*	)	211TH JUDICIAL DISTRICT

PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT J.K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK d/b/a THE BLOOD CENTER AT WADLEY

J.K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK d/b/a THE BLOOD CENTER AT WADLEY, by and through its attorney of record, John F. O'Donnell, Cowles & Thompson, 4000 InterFirst Plaza, 901 Main Street, Dallas, Texas 75202

NOW COMES PATTY JO BAKER, Individually and as presentative of the Estate of GEORGE W. BAKER aker"), Plaintiff in the above captioned cause, and ves J.K. AND SUSIE L. WADLEY RESEARCH INITUTE AND BLOOD BANK d/b/a THE BLOOD CENR AT WADLEY ("Wadley"), Defendant, pursuant to Texas Rules of Civil Procedure, Rule 169, to answer following Requests for Admissions, either admitting

ng matters, denying them, or stating in detail annot either admit or deny the truth of such ease note that all such Requests for Admissions ed unless response is made within thirty (30) service of this Request.

to be admitted or denied:

admit that some or all of the donors with the lood donor numbers:

6332361
2240800
2270312
7063387
7063519
8480738
1695222
2276636
2243377
2390722
8402712
6080730
7064671
8302828
8303478
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8302887
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8303494
8303461
8303141
8303599

s with knowledge of relevant facts concerning screening procedures utilized by Wadley either the past.

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OMITTED" OR "DENIED":

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K. GREATHOUSE
Projects Mgr. of
D SUSIE L. WADLEY RESEARCH
JTES AND BLOOD BANK d/b/a
LOOD CENTER AT WADLEY

AS)
)
)

he undersigned authority, on this day
Earl K. Greathouse, the Special Proj-
K. AND SUSIE L. WADLEY RE-
TES AND BLOOD BANK d/b/a THE

DLEY, who, being first duly
all of the foregoing Answers
are true and correct, and that
nt or representative of J.K.
RESEARCH INSTITUTES
THE BLOOD CENTER AT
ully authorized to answer on

RN TO BEFORE ME this the
6.

. HAMILTON
PUBLIC, STATE OF TEXAS

HAMILTON
ted Name of Notary)

ully submitted,

IRWIN & CONANT

. W. ARNOLD, III
W. ARNOLD, III
ate Bar No. 01339900
IL W. CASTERLINE
ate Bar No. 03983000
AN M. JONES
ate Bar No. 10958400
H ANN NORTON
ate Bar No. 15109200

anksgiving Tower
Texas 75201
0-9600

NEYS FOR PLAINTIFF,
JO BAKER, Individually and
esentative of the Estate
RGE W. BAKER

EXH

§ 77.001 CIVIL PRA

CHAPTER 77. TRANSPI

Sec.
77.001. Definition.
77.002. Policy.,
77.003. Limitation of Liab
77.004. Blood Bank: Comp

§ 77.001. Definition

In this chapter, "human
organ, blood, or componen

§ 77.002. Policy

It is important to the he
of this state that scientific
be available for the proced
tion, transfusion, or other
The imposition of strict li
zations engaged in these sc
exercise of sound medical ju
ability of the knowledge, sk
fore the public policy of th
and welfare of the people
arising from those scientif
negligence.

§ 77.003. Limitation of Li

(a) A person who donat
plants, injects, transfuses, o
from a living or dead human
who assists of participates i
a result of that activity.

(b) The person remains li
ligence.

REMEDIES CODE

TRANSFUSIONS

Seller.

' means any tissue,
from a human.

elfare of the people
skills, and materials
ansplantation, injec-
human body parts.
persons and organi-
ocedures inhibits the
d restricts the avail-
aterials. It is there-
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e person's own neg-

EXHIBIT A-4

* * * *

CROSS EXAMINATIO

BY MR. ARNOLD

Q. Dr. Hill, we met each other Mo
time; is that correct?

A. That's correct.

Q. And I took your deposition in my

A. That's correct.

Q. How many units of blood approx
lected by Wadley Blood Bank in 1975?

A. That's pretty far back.

Q. Ballpark.

A. Forty-five or fifty thousand. I'm n
current or recent statistics than that fa

Q. How many units of blood were co
in 1980; ballpark?

A. Sixty, sixty-five thousand.

Q. How many units of blood were co

A. Approximately a little short of eig

Q. Eighty thousand?

A. About eighty thousand.

Q. And how many units of blood in '

A. Probably closer to seventy thousan

Q. We discussed this in your depositio
me a ballpark figure that in 1983 there we
eighty thousand units of blood donated.

ıe first

offices?

ere col-

ar with

Wadley

1983?

ınd.

ou gave
imately
ght that

Q. All right. In 1984 When fifty thousand people donated blood to Wadley Blood Bank, how many licensed physicians were on staff at Wadley Blood Bank in '84?

A. One; the same.

Q. Doctor, are you telling this court under oath that in 1983 you had a physician/patient relationship With fifty thousand donors?

A. Absolutely.

Q. Are you telling this court that in 1984 you had a physician/patient relationship with fifty thousand donors?

A. Yes.

Q. You're quite a busy man.

THE COURT: That sounded like a statement more than a question. Let's just keep this confined to questions, please.

MR. ARNOLD: All right, Your Honor.

* * * *

Q. (By MR. WOODS) Thank you. I think that's what I have been arguing all along. What is your main function at Gulf Coast?

A. Primarily administrative function.

* * * *

BACKGR

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Current
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does not

POSE

ill authorizes blood banks to require donors to submit od tests for infectious diseases before each donation ut obtaining informed consent or providing counsel- t provides for the confidentiality of donor records certain exceptions. Damages which may be sought proper disclosure are specified. Liability under the tive Trade Practices-Consumer Protection Act is pro d under the provisions of this Act.

ION BY SECTION ANALYSIS

ION 1. Provides definitions for "blood bank" and ".

ION 2. Authorizes blood banks to require donors to to tests for infectious diseases before each donation d without being required to obtain informed consent rovide counseling.

ION 3. (a) Provides for confidentiality of blood bank l and donor records except as provided by the Act.

thorizes blood banks to report information required to local, state and federal entities.

thorizes blood banks to disclose test results with the 's name to the physician ordering the test, the at- g physician, or the person tested or person legally ized to consent to the test.

thorizes a blood bank to report donors by name with lication of a possible infectious disease to other blood without a breach of confidence taking place if the e is not specified.

EXHIBIT A-7

* * * *

Q. When a donor comes to give blood to Wadley, do you know of any documents that show that they are told that their identities and test results on their blood will be kept confidential?

A. I don't know of any explicit language to that effect.

Q. Well, we know that alleged promise of confidentiality is not on the donor source cards, do we not?

A. No, but it is certainly the standard of what we have done throughout history of blood banking.

Q. I am talking about what you tell the donors when they come in.

A. No.

Q. You never tell them that their identities and test results on their blood will be kept confidential, do you?

A. No, we don't explicitly tell them that.

Q. Doctor, back in 1983 and '84, who was in charge at Wadley of investigating AIDS in the blood supply and what should be done about it at Wadley Blood Bank?

* * * *